

BEFORE THE
DIVISION OF MEDICAL QUALITY
BOARD OF MEDICAL QUALITY ASSURANCE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

FREDERICK BERKOWITZ, M.D.
1781 W. Romneya Dr., Ste. A.
Anaheim, California 92801

Physician's and Surgeon's
License Number G003926

and

MICHAEL VICTOR ELAM, M.D.
400 Newport Center Dr., Ste. 302
Newport Beach, CA 92660

Physician's and Surgeon's
License Number C038533

Respondents.

) NO. D-3758

) NO. D-3759

) L-46679

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Division of Medical Quality, Medical Board of California as its decision in the above-entitled matter.

This Decision shall become effective September 6, 1990.

IT IS SO ORDERED August 7, 1990

MEDICAL BOARD OF CALIFORNIA
DIVISION OF MEDICAL QUALITY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By

Theresa Claassen

THERESA CLAASSEN
Secretary/Treasurer

mh

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DEPARTMENT OF CONSUMER AFFAIRS
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Complainant was represented by Barry D. Ladendorf, Deputy Attorney General. Respondent Berkowitz was present throughout most of the hearing and was represented by Robert K. Tuller and Warren Worth, Attorneys at Law. Respondent Elam was present throughout portions of the hearing and was represented by Douglas R. Reynolds and Thomas Diachenko, Attorneys at Law.

At the hearing, complainant struck the following portions of the First Supplemental Accusation: The words "and Berkowitz" at page 2, line 4; page 4, lines 2, 14, and 23; and page 5, lines 6, 13, and 20. Complainant also struck the following portions of the Amendment to the First Supplemental Accusation: The words "and Bonnie L." at page 2, line 8.

The record was held open for receipt from the parties of post-hearing briefs. Complainant's Memorandum of Points and Authorities was received on May 22, 1990, and is hereby marked for identification as Exhibit 38. Respondent Elam's post-hearing brief was received on May 30, 1990, and is hereby marked for identification as Exhibit Q. Complainant's rebuttal brief was received on June 1, 1990, and is hereby marked for identification as Exhibit 39.

Oral and documentary evidence having been received, the matter is submitted as of June 1, 1990, and the Administrative Law Judge finds as follows:

FINDINGS OF FACT

1. On her own motion, the Administrative Law Judge takes official notice that the Accusation, First Supplemental Accusation, and Amendment to the First Supplemental Accusation were made by Kenneth J. Wagstaff solely in his official capacity as Executive Director of the Board of Medical Quality Assurance (BMQA), State of California.

Re Respondent Berkowitz:

2. On or about January 17, 1957, Frederick Berkowitz (hereafter respondent Berkowitz) was issued physician's and surgeon's certificate no. G003926 by the predecessor agency of BMQA, authorizing him to practice medicine in the State of California. Said license is in full force and effect.

3. Effective April 3, 1978, respondent Berkowitz's certificate to practice medicine was suspended for one year, but said suspension was stayed and respondent Berkowitz was placed on probation for three years, based upon respondent Berkowitz's conviction of two counts of violating Business and Professions Code Section 2141 (permitting an unlicensed person to practice medicine) and other provisions of the Business and Professions Code.

4. Respondent Berkowitz received his medical degree in 1953 from the Chicago Medical School. Thereafter, he served a one year rotating internship and a three year residency, from 1954 through 1957, in otolaryngology at the Veterans Administration Hospital in Long Beach.

5. Currently, respondent Berkowitz has a private medical practice in Anaheim, California, where he specializes in facial cosmetic surgery. Respondent Berkowitz has no hospital staff privileges. He performs surgery on an outpatient basis in his office.

6. Respondent Berkowitz was an active participant in the preparation of false medical records for fraudulent purposes and the submission of fraudulent claims to a medical insurance carrier, as described herein

Re Respondent Elam:

7. On or about March 22, 1978, Michael Victor Elam (hereafter respondent Elam) was issued physician and surgeon's certificate no. CO38533, authorizing him to practice medicine in the State of California. Said certificate is in full force and effect.

8. Respondent Elam received his medical degree in 1974 from Louisiana State University (L.S.U.) Medical School. From July 1974 through December 1974, respondent Elam was an intern at Charity Hospital in New Orleans, Louisiana. Commencing January 1975, respondent Elam began a four year residency in otolaryngology at L.S.U. Medical School. During the first six months of that residency respondent was a general surgery resident. Respondent completed his otolaryngology residency in June 1979.

9. Respondent Elam is also licensed to practice medicine in Louisiana and Mississippi.

10. Respondent Elam became Board certified in otolaryngology in November 1979.

11. Respondent Elam became a partner in respondent Berkowitz's medical practice on or about January 1980. That partnership continued to on or about June 1987.

12. Since the dissolution of his partnership with respondent Berkowitz, respondent Elam has been in private medical practice in Newport Beach, California. Respondent Elam's practice is exclusively cosmetic surgery, approximately fifty percent of which is facial cosmetic surgery and fifty percent of which is body cosmetic surgery, primarily liposuction surgery and breast augmentation surgery. Respondent Elam was taught breast augmentation surgery and liposuction surgery by respondent Berkowitz, and is self-taught, as well.

13. Respondent Elam became certified by the American Board of Cosmetic Surgery in January 1981. He is one of the founding members of the American Academy of Cosmetic Surgery and the American Society of Liposuction Surgery.

14. Respondent Elam has staff privileges at College Hospital in Costa Mesa, California. Most of his surgeries, however, are performed on an outpatient basis in his medical office. Respondent Elam is in the process of attempting to receive accreditation for his outpatient facilities.

15. Respondent Elam's testimony throughout the hearing was not credible. Respondent Elam is dishonest and has no compunction about lying, even under oath. The collusive nature of the false testimony of respondent Elam and his assistant, Shelly Orozco, is shocking.

16. Respondent Elam was an active participant in the deliberate failure to document operation procedures in patients' medical records, the preparation of false medical records, the submission of fraudulent claims to medical insurance carriers, and the fraudulent submission of false documents to insurance carriers in support of those fraudulent claims, as described herein.

17. Respondent Elam views himself and his abilities in grandiose terms. He has shown no sorrow, remorse or contrition for his conduct, and it is, thus, unlikely that he will voluntarily change that conduct. Rather, respondent Elam responds to criticism by making threats to those people he perceives as critics; respondent Elam threatens others, as well.

18. The facts described above in Findings 15 through 17 demonstrate that respondent Elam is not a good candidate for probation, and that respondent Elam is a dangerous person to be licensed as a physician and surgeon.

PATIENT L [REDACTED] B [REDACTED]

Abdominoplasty:

19. On or about May 27, 1981, L [REDACTED] B [REDACTED] (hereafter B [REDACTED]), also known as L [REDACTED] H [REDACTED], who was then 35 years old, initially consulted respondents Berkowitz and Elam about an abdominoplasty, commonly known as a "tummy tuck."

20. B [REDACTED] was employed as a retail sales clerk at a local supermarket. She had primary medical insurance through her union health and pension fund (hereafter pension insurance carrier) and secondary medical insurance through her husband's employer.

21. Respondent Berkowitz conducted a limited physical examination of B [REDACTED] on May 27, 1981. At that time B [REDACTED] did not have a hernia.

22. On July 12, 1981, B [REDACTED] checked into Anaheim Doctors Hospital (hereafter Anaheim Hospital) for the abdominoplasty, which was to be performed the next day.

23. On July 13, 1981, respondents Berkowitz and Elam, with respondent Berkowitz as the surgeon and respondent Elam as the assistant surgeon, performed an abdominoplasty on B [REDACTED]. They did not perform a ventral and umbilical hernia repair or repair of a diastasis recti on B [REDACTED].

24. Abdominoplasty is a cosmetic surgical procedure for which B [REDACTED]'s pension insurance carrier did not reimburse its members. On the other hand, a hernia repair is a functional surgical procedure for which B [REDACTED]'s pension insurance carrier did partially reimburse its members. At all times, respondents Berkowitz and Elam were aware of the abdominoplasty reimbursement policies and practices of B [REDACTED]'s pension insurance carrier, which were the standard in the community.

25. At all times, respondents Berkowitz and Elam conspired together to prepare false office medical records and false Anaheim Hospital medical records of B [REDACTED], as part of a scheme to present a fraudulent claim to B [REDACTED]'s pension insurance carrier.

26. Respondents Berkowitz and Elam prepared false office medical records and false Anaheim Hospital medical records of B [REDACTED], which falsely portrayed B [REDACTED] as having a hernia and which falsely portrayed the surgery on July 13, 1981, as primarily for a hernia repair rather than a "tummy tuck". Respondents Berkowitz and Elam were dishonest in falsifying their office medical records and Anaheim Hospital's medical records of B [REDACTED] in this manner.

27. Respondents Berkowitz and Elam billed B [REDACTED]'s pension insurance carrier \$3,172.00 for respondent Berkowitz's services as surgeon on the following: Relative value studies (RVS) no. 49560 - "repair ventral hernia"; RVS 49583 - "repair umbilical hernia"; and RVS 15820 - "Recti diastasis, Lipectomy". In addition,

respondents Berkowitz and Elam billed B's pension insurance carrier \$600.00 for respondent Elam's services as assistant surgeon on the foregoing procedures. In making the foregoing insurance claims to B's pension insurance carrier, respondents Berkowitz and Elam presented a fraudulent claim for payment of a loss under a contract of insurance.

28. The abdominoplasty performed by respondent Berkowitz on B was performed competently, within the standard of care in the greater Los Angeles community.

Septorhinoplasty:

29. B consulted respondents Berkowitz and Elam several times during the fall of 1981. In some of these consultations respondents Berkowitz and Elam proposed new, additional cosmetic surgeries for B, including breast augmentation, septorhinoplasty, blepharoplasty and malar implants.

30. At all times prior to November 18, 1981, B did not have an injury or fracture to her nose, and B's nasal septum was normal, not deviated.

31. On November 18, 1981, respondents Berkowitz and Elam performed a septorhinoplasty, commonly known as a "nose job," on B in their outpatient surgical suite. Respondent Berkowitz was the surgeon and respondent Elam was the assistant surgeon.

32. Rhinoplasty is a cosmetic surgical procedure for which B's pension insurance carrier did not reimburse its members. On the other hand, repair of a nasal septum, referred to as septorhinoplasty when combined with rhinoplasty, is a functional surgical procedure for which B's pension insurance carrier did partially reimburse its members. At all times, respondents Berkowitz and Elam were aware of the rhinoplasty/septorhinoplasty reimbursement policies and practices of B's pension insurance carrier, which were the standard in the community.

33. At all times, respondents Berkowitz and Elam conspired together to prepare false office medical records of B, as part of a scheme to present a fraudulent claim to B's pension insurance carrier.

34. Respondents Berkowitz and Elam prepared false office medical records, which falsely portrayed B as having a nasal obstruction and difficulty breathing, requiring a functional medical procedure be performed on B's nasal septum rather than a rhinoplasty. Respondents Berkowitz and Elam were dishonest in falsifying their office medical records of B in this manner.

35. Respondents Berkowitz and Elam billed B's pension insurance carrier \$2189.00 for respondent Berkowitz's services as surgeon on the following: RVS no. 30420 -- "septorhinoplasty with major septal repair of nasal airway obstruction." In addition, respondents Berkowitz and Elam billed B's pension insurance carrier \$400.00 for respondent Elam's services as assistant surgeon on the foregoing procedure. In making the foregoing insurance claims to B's pension insurance carrier, respondents Berkowitz and Elam presented a fraudulent claim for payment of a loss under a contract of insurance.

36. B's pension insurance carrier paid respondents Berkowitz and Elam completely for the septorhinoplasty performed on B on November 18, 1981, and B did not pay respondents Berkowitz and Elam any money. Without the insurance reimbursement, it is unlikely that B would have had the septorhinoplasty done.

Blepharoplasty:

37. In the fall of 1982, B consulted respondents Berkowitz and Elam about bilateral upper and lower blepharoplasty, commonly known as eyelid surgery.

38. At all times prior to April 18, 1983, B did not have senile ptosis of the upper eyelids, nor did she have an obstruction of the visual field by her upper eyelids.

39. On April 18, 1983, respondent Berkowitz performed bilateral upper and lower blepharoplasties on B in Beach Community Hospital (hereafter Beach Hospital), in Buena Park, California.

40. Upper eyelid blepharoplasty is a cosmetic surgical procedure for which B's pension insurance carrier did not reimburse its members, unless there was a functional component whereby the upper eyelids interfered with the member's vision. Lower eyelid blepharoplasty is a cosmetic surgical procedure for which B's pension insurance carrier did not reimburse its members. At all times, respondents Berkowitz and Elam were aware of the blepharoplasty reimbursement policies and practices of B's pension insurance carrier, which were the standard in the community.

41. At all times, respondents Berkowitz and Elam conspired together to prepare false office medical records and false Beach Hospital medical records of B, as part of a scheme to present a fraudulent insurance claim to B's pension insurance carrier,

42. Respondents Berkowitz and Elam prepared false office medical records and false Beach Hospital medical records of B■■■■, which falsely portrayed B■■■■ as having senile ptosis of the upper eyelids, which obstructed B■■■■'s field of vision, and which falsely portrayed the surgery on April 18, 1981, as primarily for senile ptosis repair rather than upper eyelid blepharoplasty. Respondents Berkowitz and Elam were dishonest in falsifying their office medical records and Beach Hospital's medical records of B■■■■ in this manner.

43. As part of their conspiracy to prepare false medical records of B■■■■ to present a fraudulent claim to B■■■■'s pension insurance carrier, respondents Berkowitz and Elam did the following:

A. Respondents Berkowitz and Elam requested preauthorization from B■■■■'s pension insurance carrier for the bilateral upper eyelid surgery. In response, B■■■■'s pension insurance carrier requested photographs and visual field studies of B■■■■. In response to the pension insurance carrier's request, respondents Berkowitz and Elam, either individually or jointly, sent B■■■■'s pension insurance carrier a photograph of a woman other than B■■■■, who appeared to have ptosis of the upper eyelids, and two field studies showing an upper visual field obstruction, which falsely were purported to be studies of B■■■■.

B. On December 9, 1982, respondent Elam falsely represented to B■■■■'s pension insurance carrier that B■■■■ had ptosis of the upper eyelids, which obstructed B■■■■'s field of vision.

44. Respondents Berkowitz and Elam billed B■■■■'s pension insurance carrier \$2,617.00 for respondent Berkowitz's services as surgeon on B■■■■'s bilateral upper blepharoplasty, falsely claiming it was correction of a vision obstruction from senile ptosis. In addition, respondents Berkowitz and Elam billed B■■■■'s pension insurance carrier \$400.00 for respondent Elam's services as assistant surgeon on the bilateral upper blepharoplasty. In making the foregoing insurance claims to B■■■■'s pension insurance carrier, respondents Berkowitz and Elam presented a fraudulent claim for payment of a loss under a contract of insurance.

45. Neither respondent Berkowitz nor respondent Elam made an operative report of the bilateral lower blepharoplasty performed on B■■■■ on April 18, 1983.

46. Respondents Berkowitz and Elam failed to make an operative report of the bilateral lower blepharoplasty performed on B■■■■ as part of their overall scheme to falsely portray B■■■■'s surgery as a functional procedure, rather than a cosmetic procedure.

47. The standard of care in Southern California requires that a physician prepare an operative report for every major operative procedure performed on a patient. Respondents Berkowitz's and Elam's failure to prepare an operative report of B■■■■'s bilateral lower blepharoplasty is a departure from that standard of care and constitutes negligence.

Scar Revision:

48. B■■■■ was unhappy with the scar from the "tummy tuck". She and respondents Berkowitz and Elam discussed the scar for many months, and mutually agreed that a scar revision would be done. B■■■■'s scar had become thickened and hypertrophied. It also had "dog ears", or excess flaps of skin, on each end. Moreover, due to the tension across B■■■■'s abdomen, a portion of the scar was pulled upward, so that it formed an inverted V above B■■■■'s pubis.

49. Following the abdominoplasty, respondents Berkowitz and Elam, individually, failed to treat the hypertrophic portion of B■■■■'s scar with steroid injections, and failed to treat the scar with pressure bandages. These failures constitute gross negligence.

50. On April 18, 1983, respondent Elam revised B■■■■'s "tummy tuck" scar, while respondent Berkowitz was performing the bilateral upper and lower blepharoplasties on B■■■■. Respondent Elam properly revised the "dog ears" on each end of the scar. He also attempted to revise the hypertrophic part of the scar, which primarily was an inverted V above the pubis, by doing a V to Y advancement. Respondent Elam did not fully excise the hypertrophic part of the scar.

51. The scar revision by respondent Elam was not successful, and the resultant scar was quite unsightly, with a central "dog ear" in the mid-lower portion of B■■■■'s abdomen. Respondent Elam was grossly negligent in revising B■■■■'s scar.

52. It cannot be said, however, that respondent Elam was incompetent in revising B■■■■'s scar. There is more than one acceptable approach to revising a "tummy tuck" scar, and the approach attempted by respondent Elam does not demonstrate a lack of ability and knowledge in scar revision, generally.

53. At all times, respondents Berkowitz and Elam conspired together to prepare false office medical records and false Beach Hospital medical records of B[REDACTED].

54. Respondents B[REDACTED] and Elam prepared false office medical records and false Beach Hospital medical records of B[REDACTED], which falsely portrayed B[REDACTED]'s scar as a hypertropied Pfannenstiel scar resulting from a Caesarean section and hysterectomy. B[REDACTED] did not have a scar from a Caesarean section or hysterectomy; her scar was solely from the abdominoplasty performed by respondents Berkowitz and Elam in 1981. Respondents Berkowitz and Elam were dishonest in falsifying their office medical records and Beach Hospital's medical records of B[REDACTED] in this manner.

55. Neither respondent Berkowitz nor respondent Elam made an operative report of the abdominoplasty scar revision performed on B[REDACTED] on April 18, 1983.

56. Respondents Berkowitz's and Elam's failure to prepare an operative report of the abdominoplasty scar revision on B[REDACTED] is a departure from the standard of care and constitutes negligence.

57. Respondents Berkowitz and Elam did not bill B[REDACTED] or her pension insurance carrier for the abdominoplasty scar revision performed on B[REDACTED] on April 18, 1983, at Beach Hospital.

PATIENT B[REDACTED] L[REDACTED]

Consents:

58. On or about February 21, 1984, B[REDACTED] L[REDACTED] (hereafter L[REDACTED]), then 49 years old, consulted respondent Elam about facial cosmetic surgery. L[REDACTED] had in mind a rhytidectomy, commonly known as a lower face lift (to tighten the skin on her neck and under her chin) and bilateral upper and lower blepharoplasties. Respondent Elam recommended to L[REDACTED] that she have a forehead lift or brow lift, a septorhinoplasty and a lower blepharoplasty.

59. L[REDACTED] had primary medical insurance with Blue Cross through her husband's employer.

60. In 1984 L[REDACTED] had won the Mrs. California beauty pageant, and had been the first runner-up in the Mrs. America beauty pageant. In addition, L[REDACTED] and one of her daughters had been the first runner-up in a mother-daughter beauty pageant. Moreover, one of L[REDACTED]'s daughters was the owner of a beauty pageant and L[REDACTED] occasionally acted as emcee or narrator for her daughter's pageants.

61. Before 1984 L [REDACTED] had some familiarity with cosmetic surgery. L [REDACTED] had had an abdominoplasty several years previously, and respondent Elam had performed septorhinoplasties on two of L [REDACTED]'s daughters.

62. On March 21, 1984, L [REDACTED] agreed to have a bilateral lower blepharoplasty, and she signed consent forms for that surgery. Respondent Elam set the cost of that surgery at \$1,000. However, L [REDACTED] cancelled the surgery before it took place.

63. On September 20, 1985, L [REDACTED] again consulted respondent Elam about facial cosmetic surgery. She and respondent Elam agreed that L [REDACTED] would have a rhytidectomy and bilateral upper and lower blepharoplasties. Respondent Elam set the cost of those surgeries at \$4,000. L [REDACTED] paid respondent Elam an \$800.00 deposit.

64. At all times, respondent Elam, in his professional opinion, believed that the preferred facial cosmetic surgeries for L [REDACTED] were a forehead lift, a septorhinoplasty, a bilateral lower blepharoplasty, and malar cheek implants, rather than a rhytidectomy and bilateral upper and lower blepharoplasties.

65. On October 14, 1985, L [REDACTED] signed consent forms for a rhytidectomy and bilateral upper and lower blepharoplasties. L [REDACTED] understood that those surgeries would be performed on her by respondent Elam on October 29, 1985.

66. On October 29, 1985, when L [REDACTED] arrived at respondent Elam's office for the rhytidectomy and bilateral upper and lower blepharoplasties, she paid respondent Elam an additional \$3200.00, as previously agreed to.

67. After paying the surgical fee, respondent Elam, through his office personnel, requested that L [REDACTED] consent to additional surgical procedures, specifically a forehead lift, a septorhinoplasty, and malar cheek implants. L [REDACTED] then signed consent forms for a forehead lift, a septorhinoplasty, and malar cheek implants. When she signed these consent forms, L [REDACTED] did not have a full understanding of the medical procedures to which she was consenting; and L [REDACTED]'s consents were not knowingly and intelligently made.

68. L [REDACTED] did not date the consent forms that she signed on October 29, 1985. One of respondents Berkowitz's and Elam's employees falsely dated those consent forms with the date of October 14, 1985.

69. Respondent Elam was aware that L [REDACTED] did not have a full understanding of the medical procedures to which she consented on October 29, 1985, and respondent Elam knew that L [REDACTED]'s consents to those procedures were not knowingly and intelligently made.

70. Nevertheless, respondent Elam, on October 29, 1985, in the outpatient surgical suite of his office, performed the following cosmetic surgeries on L[REDACTED]: a forehead lift, a septorhinoplasty, a bilateral lower blepharoplasty, and malar cheek implants.

71. Respondent Elam's performance of certain surgical procedures on L[REDACTED] when he had full knowledge that L[REDACTED]'s consents to those surgical procedures were not knowing and intelligently made, as described above in Findings 58, 63 - 70, constitutes gross negligence.

72. Respondent Berkowitz was not the assistant surgeon to respondent Elam on the medical procedures described above in Finding 70.

73. Respondent Elam failed to make an operative report of each of the following surgical procedures performed on L[REDACTED] on October 29, 1985: the forehead lift, the bilateral lower blepharoplasty, and the malar cheek implants.

74. Respondent Elam's failure to prepare each of the operative reports listed above in Finding 73 is a separate departure from the standard of care and constitutes a separate act of negligence.

75. Respondent Elam made an operative report only of the septorhinoplasty performed on B[REDACTED].

76. At all times prior to October 29, 1985, L[REDACTED]'s nasal septum was normal, not deviated.

77. Respondent Elam prepared false office medical records of L[REDACTED], which falsely portrayed L[REDACTED] as having a deviated septum and nasal obstruction, requiring that a functional medical procedure be performed on L[REDACTED]'s nasal septum rather than a rhinoplasty, as part of a scheme to present a fraudulent insurance claim to Blue Cross. Respondent Elam was dishonest in falsifying L[REDACTED]'s office medical records in this manner.

78. On or about February 5, 1986, respondent Elam billed Blue Cross \$3189.00 for his services as surgeon for RVS no. 30420 -- "open septorhinoplasty with major septal repair of nasal

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airway obstruction". In addition, respondent Elam billed Blue Cross \$600.00 for respondent Berkowitz's services as assistant surgeon on the septorhinoplasty. In making the foregoing insurance claims to Blue Cross, respondent Elam presented two fraudulent claims for payment of a loss under a contract of insurance.

79. All allegations not specifically found to be true are found to be untrue.

* * * * *

Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

CONCLUSIONS OF LAW

Re Respondent Berkowitz:

1. Grounds exist to revoke or suspend respondent Berkowitz's license to act as a physician and surgeon pursuant to Business and Professions Code (hereafter BPC) Section 2220 in that respondent Berkowitz acted unprofessionally in that he was dishonest in preparing false office and hospital medical records in violation of BPC Sections 2234(e), 2261 and 2262, based, separately, on Findings 21 - 24 and 26 jointly, Findings 30 - 32 and 34 jointly, Findings 37 - 40, 42, 43, 45 and 46 jointly, and Finding 54, and for all.

2. Other grounds exist to revoke or suspend respondent Berkowitz's license to act as a physician and surgeon pursuant to BPC Sections 2220 and 810(a) in that respondent Berkowitz acted unprofessionally by presenting fraudulent medical insurance claims and false documents in support of such claims in violation of BPC Section 810, based, separately, on Finding 6 in conjunction with Findings 21 - 24 and 27 jointly, Findings 30 - 32, 35 and 36 jointly, and Findings 37 - 40 and 43 - 46 jointly, and for all.

3. Grounds also exist to revoke or suspend respondent Berkowitz's license to act as a physician and surgeon pursuant to BPC Section 2220 in that respondent Berkowitz acted unprofessionally in violation of BPC Section 2234(a) by conspiring with respondent Elam to violate BPC Sections 2234(e), 2261, 2262, and/or 810(a), as set forth in Conclusions of Law nos. 1, 2 and 9, and based, separately, on Findings 21 - 27 jointly, Findings 30 - 36 jointly, Findings 37 - 46 jointly, and Findings 50 and 53 - 55 jointly, and for all.

4. In determining the appropriate Order, the Administrative Law Judge has considered, in addition to Conclusions of Law nos. 1, 2 and 3, Findings 2 - 6.

Re Respondent Elam:

5. Grounds exist to revoke or suspend respondent Elam's license to act as a physician and surgeon pursuant to BPC Section 2220 in that respondent Elam acted unprofessionally in violation of BPC Section 2234(b) by being grossly negligent, based, separately, on Findings 23, 48 and 49 jointly, Findings 48, 50 and 51 jointly, and Findings 58, 63 - 71, and for all.

6. Grounds also exist to revoke or suspend respondent Elam's license to act as a physician and surgeon pursuant to BPC Section 2220 that respondent Elam acted unprofessionally in violation of BPC Section 2234(c) by committing repeated acts of negligence, based on Findings 39, 46 and 47 jointly, Findings 50, 55 and 56 jointly, and Findings 70, 73 and 74 jointly, and for all.

7. Other grounds exist to revoke or suspend respondent Elam's license to act as a physician and surgeon pursuant to BPC Section 2220 in that respondent Elam acted unprofessionally in that he was dishonest in preparing false office and hospital medical records in violation of BPC Sections 2234(e), 2261, and 2262, based, separately, on Findings 21 - 24 and 26 jointly, Findings 30 - 32 and 34 jointly, Findings 37 - 40, 42, 43, 45 and 46 jointly, Finding 54, and Findings 76 and 77 jointly, and for all.

8. Other grounds exist to revoke or suspend respondent Elam's license to act as a physician and surgeon pursuant to BPC Sections 2220 and 810(a) in that respondent Elam acted unprofessionally by presenting fraudulent medical insurance claims and false documents in support of such claims in violation of BPC Section 810, based, separately, on Finding 16 in conjunction with Findings 21 - 24 and 27 jointly, Findings 30 - 32, 35 and 36 jointly, Findings 37 - 40 and 43 - 46 jointly, and Findings 76 - 78 jointly, and for all.

9. Final grounds exist to revoke or suspend respondent Elam's license to act as a physician and surgeon pursuant to BPC Section 2220 in that respondent Elam acted unprofessionally in violation of BPC 2234(a) by scheming alone, and conspiring with respondent Berkowitz, to violate BPC Sections 2234(e), 2261, and 2262, and/or 810(a), as set forth above in Conclusions of Law nos. 3, 7 and 8 and based, separately, on Findings 21 - 27 jointly, Findings 30 - 36 jointly, Findings 37 - 46, Findings 50 and 53 - 55 jointly, and Findings 76 - 78 jointly, and for all.

10. It was not established that respondent Elam violated BPC Section 2234(d) by being incompetent, based on Finding 52.

11. In determining the appropriate Order, the Administrative Law Judge has considered, in addition to Conclusions of Law nos. 5 - 9, Findings 7 - 18.

* * * * *

WHEREFORE, THE FOLLOWING ORDER is hereby made:

ORDER

A. Physician's and surgeon's license no. G003926 issued to respondent Frederick Berkowitz, M.D., is hereby revoked, based on Conclusions of Law no. 4 in conjunction with Conclusions of Law nos. 1 through 3, separately, and for all. However, said revocation is stayed and respondent Berkowitz is placed on probation for six (6) years on the following terms and conditions:

1. As part of probation, respondent Berkowitz's license is suspended for six (6) months, beginning the effective date of this Decision.

2. Respondent Berkowitz shall provide free medical services on a regular basis to a community or charitable facility or agency for at least twenty (20) hours per month for the first twenty-four (24) months of probation after suspension of his license is lifted. Within sixty (60) days of the effective date of this Decision, respondent Berkowitz shall submit to the Division for its prior approval the community service program.

3. Respondent Berkowitz shall take and complete a course in medical ethics. Within sixty (60) days of the effective date of this Decision, respondent Berkowitz shall select and submit the name and location of the medical ethics course to the Division for its prior approval.

4. Within sixty (60) days of the effective date of this Decision, respondent Berkowitz shall submit to the Division for its prior approval a plan in which respondent Berkowitz's medical records and insurance billings shall be monitored by another physician in respondent's field of practice, who shall provide periodic reports to the Division, for at least the first twenty-four (24) months of probation after suspension of his license is lifted. Said period may be extended, at the option of the Division, based upon the reports to the Division by the monitor.

5. Respondent shall obey all federal, state and local laws, and all rules governing the practice of medicine in California.

6. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, stating whether there has been compliance with all the conditions of probation.

7. Respondent shall comply with the Division's probation surveillance program.

8. Respondent shall appear in person for interviews with the Division's medical consultant, upon request, at various intervals and with reasonable notice after suspension of his license is lifted.


9. The period of probation shall not run during the time respondent is residing or practicing outside of California. If, during probation, respondent moves out of California to reside or practice elsewhere, he is required to immediately notify the Division in writing of the date of departure and the date of return, if any.

10. If respondent violates probation in any respect, the Division, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation or Petition to Revoke Probation is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

11. Upon successful completion of probation, respondent Berkowitz's certificate shall be fully restored.

B. Physician and Surgeon's license no. C038533 issued to respondent Michael Victor Elam, M.D., is hereby revoked, based upon Conclusions of Law no. 11 in conjunction with Conclusions of Law nos. 5 through 9, separately, and for all.

Dated: July 6, 1990


ROSALYN M. CHAPMAN
Administrative Law Judge
Office of Administrative Hearings

RMC:mh

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 2 of the State of California
 3 BARRY D. LADENDORF
 4 Deputy Attorney General
 5 110 West A Street, Suite 700
 6 San Diego, California 92101
 7 Telephone: (619) 237-7811

8 Attorneys for Complainant

9 BEFORE THE
 10 DIVISION OF MEDICAL QUALITY
 11 BOARD OF MEDICAL QUALITY ASSURANCE
 12 DEPARTMENT OF CONSUMER AFFAIRS
 13 STATE OF CALIFORNIA

14 In the Matter of the Accusation) No. D-3758
 15 Against:)
 16)
 17 FREDERICK BERKOWITZ, M.D.) ACCUSATION
 18 1781 W. Romneya Drive, Ste. A)
 19 Anahiem, California 92801)
 20 Physician's and Surgeon's)
 21 License No. G 003926)
 22)
 23 and)
 24)
 25 MICHAEL VICTOR ELAM, M.D.)
 26 400 Newport Center Drive, #302)
 27 Newport Beach, CA 92660)
 Physician's and Surgeon's)
 License No. CO 38533)
 Respondents.)

28 Complainant, Kenneth J. Wagstaff, alleges:

29 1. He is the Executive Director of the Board of
 30 Medical Quality Assurance of the State of California and makes
 31 and files this accusation in his official capacity.

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LICENSE HISTORY

2. On or about January 17, 1957, Frederick Berkowitz was issued physician's and surgeon's certificate No. G 003926 authorizing him to practice medicine in the State of California. On April 3, 1978, Berkowitz was subject to discipline in that he was found guilty of aiding and abetting the unlicensed practice of medicine. Berkowitz was suspended from the practice of medicine for one year; however, the suspension was stayed and he was placed on probation for 3 years under various terms and conditions.

3. On or about March 22, 1978, Michael Victor Elam was issued physician's and surgeon's certificate No. CO 38533 authorizing him to practice medicine in the State of California.

STATUTES

4. Sections 2220 and 2227 of the Business and Professions Code (Code) provide that the Division of Medical Quality of the Board of Medical Quality Assurance (Division) may take action against any physician guilty of violating the Medical Practice Act (Code, § 2000 et seq.) by suspending, revoking or placing on probation the certificate of said licensee or by publicly reprimanding or taking such other action in relation to discipline as the Division deems appropriate.

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1 5. Business and Professions Code section 2234
2 states:

3 "The Division of Medical Quality shall take
4 action against any licensee who is charged with
5 unprofessional conduct. In addition to other
6 provisions of this article, unprofessional conduct
7 includes, but is not limited to, the following:

8 "(a) Violating or attempting to violate,
9 directly or indirectly, or assisting in or abetting
10 the violation of, or conspiring to violate, any
11 provision of this chapter.

12 "(b) Gross negligence.

13 "(c) Repeated negligent acts.

14 "(d) Incompetence.

15 "(e) The commission of any act involving
16 dishonesty or corruption which is substantially
17 related to the qualifications, functions, or duties
18 of a physician and surgeon.

19 "(f) Any action or conduct which would have
20 warranted the denial of a certificate."

21 6. Business and Professions Code section 2261
22 states:

23 "Knowingly making or signing any certificate or
24 other document directly or indirectly related to the
25 practice of medicine or podiatry which falsely
26 represents the existence or nonexistence of a state
27 of facts, constitutes unprofessional conduct."

1 7. Business and Professions Code section 2262
2 states:

3 "Altering or modifying the medical record of any
4 person, with fraudulent intent, or creating any false
5 medical record, with fraudulent intent, constitutes
6 unprofessional conduct.

7 "In addition to any other disciplinary action,
8 the Division of Medical Quality or the California
9 Board of Podiatric Medicine may impose a civil
10 penalty of five hundred dollars (\$500) for a
11 violation of this section."

12 8. Business and Professions Code section 810 states:

13 "(a) It shall constitute unprofessional conduct
14 and grounds for disciplinary action, including
15 suspension or revocation of a license or certificate,
16 for a health care professional to do any of the
17 following in connection with his professional
18 activities:

19 "(1) Knowingly present or cause to be
20 presented any false or fraudulent claim for the
21 payment of a loss under a contract of insurance.

22 "(2) Knowingly prepare, make, or subscribe
23 any writing, with intent to present or use the same,
24 or to allow it to be presented or used in support of
25 any such claim.

26 "(b) As used in this section, health care
27 professional means any person licensed or certified

1 pursuant to the Osteopathic Initiative Act, or the
2 Chiropractic Initiative Act."

3 CHARGES AND ALLEGATIONS OF UNPROFESSIONAL CONDUCT

4 Patient - L. B.

5 First Surgery - Dermolipectomy - Tummy Tuck

6 9. At all times herein mentioned L. B. (aka
7 L. H.) was a patient of respondents Berkowitz and Elam.

8 10. On or about May 29, 1981, L. B. told
9 respondents Berkowitz and Elam that she desired a "tummy tuck".
10 The "tummy tuck" procedure was for cosmetic purposes only
11 because L. B. had no functional disorders in the abdominal
12 area.

13 11. L. B. was admitted to Anaheim Doctors
14 Hospital on July 12, 1981. The history and physical prepared
15 by Elam states that L. B. was "referred to our office
16 because of a ventral abdominal hernia."

17 12. On or about July 12, 1981, Berkowitz (surgeon)
18 and Elam (assistant) performed what is described in the
19 operative report as a "ventral and umbilical herniae repair
20 with abdominal dermolipectomy."

21 13. On or about August 14, 1981, respondents
22 Berkowitz and Elam submitted claims for insurance benefits for
23 services rendered in the amount of \$3,172.00 (Berkowitz) and
24 \$600.00 (Elam). Among other things the form listed "Repair
25 Ventral Hernia", "Repair Umbilical Hernia".

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1 14. Respondents Berkowitz and Elam are guilty of
2 dishonesty in violation of Code section 2234, subdivision (e)
3 by reason of the following:

4 The hospital records for patient L [REDACTED]
5 B., including the history and physical, the
6 operative report and the discharge summary contain
7 false information including but not limited to the
8 following: that L [REDACTED] B. was referred to
9 respondents "because of a ventral abdominal hernia,"
10 that the patient reports "frequent episodes" of
11 "abdominal pain and discomfort when she has bowel
12 movements," that the examination of the patient
13 revealed a "ventral umbilical defect." In truth, and
14 in fact, L [REDACTED] B. was not referred to respondents
15 because of a ventral abdominal hernia, nor did she
16 report frequent episodes of abdominal pain and
17 discomfort when she has bowel movements, nor did the
18 examination reveal a ventral umbilical defect.
19 Respondents created the false hospital charts and
20 insurance billing forms to insure that the patient's
21 insurance carrier would pay for the surgical
22 procedure.

23 15. Respondents Berkowitz and Elam are guilty of
24 unprofessional conduct in violation of Code section 810,
25 subdivisions (1) and (2) and subject to discipline, in that
26 they knowingly presented a false claim for the payment of a
27 loss under a contract of insurance and prepared written reports

1 in support of said claims, as alleged in paragraphs 11, 12, 13,
2 and 14 above.

3 16. Respondents Berkowitz and Elam knowingly made
4 and signed records, reports, claims and documents that falsely
5 represented the existence or nonexistence of a state of facts
6 as alleged in paragraphs 11, 12, 13, and 14 above. Said
7 conduct is a violation of Code section 2261 and a cause for
8 discipline.

9 17. Respondents Berkowitz and Elam created a false
10 medical record with fraudulent intent as alleged in paragraphs
11 11, 12, 13, and 14. Said conduct is a violation of Code
12 section 2262 and a cause for discipline.

13 Second Surgery - Scar Revision of the Tummy Tuck

14 18. On or about April 18, 1983, respondents scheduled
15 L. B. for a surgical procedure to revise the hypertrophied
16 scar of her lower abdomen. This scar was a result of the
17 above-mentioned dermolipectomy performed by respondents.

18 19. Respondent Elam is guilty of gross negligence in
19 violation of Code section 2234, subdivision (b) in the
20 performing and managing of the scar revision procedure by
21 reason of the following:

22 (A) The scar tissue from the original surgery
23 was not completely excised.

24 "(B) The lateral dog ears created in the first
25 surgery were not properly corrected in that Elam
26 moved all the tissue in medially and created a
27 dramatic central dog ear and a limb of vertical scar.

1 "(C) There was poor wound closure with
2 overlapping of wound edges and attempts at mattress
3 suturing that resulted in hypertrophic scarring.

4 "(D) Post-operative management was not
5 appropriate in that, among other things, there was no
6 use of pressure or diluted Kenalog injections.

7 "(E) Respondent Elam never prepared an
8 operative report of the surgical procedure.

9 20. Respondent Elam's conduct set forth in paragraph
10 19 above is likewise evidence of incompetence and a violation
11 of Code section 2234, subdivision (d) and a cause for
12 discipline.

13 21. In the Beach Community Hospital's records of the
14 physical examination and elsewhere, respondent Elam described
15 the hypertrophic abdominal scar as a post-Cesarean section with
16 hypertrophical Pfannenstiel incision.

17 In truth and in fact, the scar was not the result of
18 a Cesarean section but the result of the dermolipectomy
19 performed by respondents.

20 Respondent Elam's false and misleading statement is
21 dishonesty in violation of Code section 2234, subdivision (e)
22 and a cause for discipline.

23 22. Respondent Elam's false statements as alleged in
24 paragraph 21 above is a statement that falsely represents the
25 existence or nonexistence of a state of facts in violation of
26 Code section 2261, and a cause for discipline.

27 /

1 Third Surgery - Senile Ptosis - Blepharoplasty

2 23. On or about April 18, 1983, during the hospital
3 admission and surgery performed as alleged in paragraphs 18
4 through 22 above, respondent Berkotwitz also performed a
5 surgical procedure on the eyelids of patient L. B.

6 The Beach Community Hospital's consent form signed by
7 patient L. B. is for a "UPPER AND LOWER BLEPHAROPLASTY,
8 REVISION OF ABDOMINAL SCAR."

9 24. The Beach Community Hospital's operative records
10 signed by respondent Elam state that patient L. B.'s pre-
11 and post-operative diagnosis was senile ptosis and that the
12 operation performed was "repair of senile ptosis, bilateral."
13 In truth and in fact, respondents did not perform the repair of
14 senile ptosis as stated in the medical records.

15 The general history sheet of the hospital records
16 states that the patient was referred to office for evaluation
17 of ptosis of the eyelids and that the patient was found to
18 have a peripheral visual defect which was worse on the left
19 than on the right. The record states that under examination
20 she was found to have a 35% reduction on the left due to eyelid
21 ptosis. Finally, the history states that operative correction
22 of the ptosis with levator muscle suspension was discussed at
23 length with patient. In truth and in fact, none of the facts
24 stated herein above are true. The respondents falsified the
25 medical records of patient L. B. to insure payment of the
26 operative procedure by the patient's insurance carrier.

27

1 The false statements contained in the hospital
2 records of the patient is an act of dishonesty in violation of
3 Code section 2234, subdivision (e) and a cause for discipline.

4 25. The respondents knowingly making the false
5 statements and the creation of false medical records, with
6 fraudulent intent as alleged in paragraph 24 is a violation of
7 Code sections 2261 and 2262, respectively, and a cause for
8 discipline.

9 26. Respondents Berkowitz and Elam are guilty of
10 unprofessional conduct in violation of Code section 810,
11 subdivision (1) and (2), and subject to discipline in that they
12 knowingly presented a false claim for the payment of a loss
13 under a contract of insurance and prepared written reports in
14 support of said claims, as alleged in paragraph 24.

15 Fourth Surgery - Septo-Rhinoplasty

16 27. On or about November 18, 1981, patient L [REDACTED]
17 B. underwent a septo-rhinoplasty with major septal repair of
18 nasal airway obstruction, performed by respondents. The pre-
19 operative diagnosis was nasal septal deformity.

20 28. Patient L [REDACTED] B. told that the insurance
21 carrier would pay for the procedure.

22 29. Respondents' statements in the L [REDACTED] B.
23 hospital records that she had a nasal septal deformity, a
24 deviated nasal septum and difficulty breathing are false
25 statements. In truth and in fact, L [REDACTED] B. did not have
26 difficulty breathing and had no nasal septal deviation or
27 deformity.

1 30. On or about December 8, 1981, respondents Elam
2 and Berkowitz submitted false claims for payment to L█████
3 B.'s insurance carrier. The claim form states, among other
4 things, that L█████ B. had a "Nasal Septal Deformity" and that
5 a "Septo Rhinoplasty with major septal repair of nasal airway
6 obstruction" was performed. The false claims totaled
7 \$2,589.00.

8 In truth and in fact, L█████ B. did not have a nasal
9 septal deformity or difficulty breathing.

10 31. Respondents Bertkowitz and Elam are guilty of
11 unprofessional conduct in violation of Code section 810,
12 subdivision (1) and (2), and subject to discipline in that they
13 knowingly presented a false claim for the payment of a loss
14 under a contract of insurance and prepared written reports in
15 support of said claims, as alleged in paragraphs 29 and 30.

16 32. Respondents knowingly making the false
17 statements alleged in paragraphs 29 and 30 above, falsely
18 represents the existence or nonexistence of a state of facts
19 and is the creating of a false medical record, with fraudulent
20 intent in violation of Code section 2261 and 2262 respectively,
21 and a cause for discipline.

22 33. Respondents' false statements as alleged in
23 paragraphs 29 and 30 above, is dishonesty in violation of Code
24 section 2234, subdivision (3) and a cause for discipline.

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1 WHEREFORE, complainant prays that the Division hold
2 the hearing in the charges and allegations hereinabove and
3 following said hearing:

4 1. Suspend or revoke respondents' medical licenses,
5 and,

6 2. Take such other and further action as may be
7 appropriate to protect the public health, safety and
8 welfare.

9 DATED: March 22, 1988

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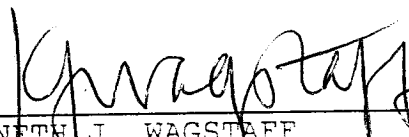
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KENNETH J. WAGSTAFF
Executive Director
Division of Medical Quality
Board of Medical Quality Assurance
State of California

Complainant

1 JOHN K. VAN DE KAMP, Attorney General
 of the State of California
 2 BARRY D. LADENDORF
 Deputy Attorney General
 3 110 West A Street, Suite 700
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 4 Telephone: (619) 237-7811
 5 Attorneys for Complainant

6

7

BEFORE THE

8

DIVISION OF MEDICAL QUALITY

9

MEDICAL BOARD OF CALIFORNIA

10

DEPARTMENT OF CONSUMER AFFAIRS

11

STATE OF CALIFORNIA

12

13 In the Matter of the Accusation) No. D- 3758
 Against:)

14

FREDERICK BERKOWITZ, M.D.) FIRST SUPPLEMENTAL ACCUSATION
 15 1781 W. Romneya Drive, Ste. A)
 Anaheim, California 92801)

16

Physician's and Surgeon's)
 17 License No. G 003926)

18

and)

19

MICHAEL VICTOR ELAM, M.D.)
 400 Newport Center Drive, #302)
 20 Newport Beach, CA 92660)

21

Physician's and Surgeon's)
 License No. CO 38533)

22

Respondents.)

23

24 Complainant, Kenneth J. Wagstaff, alleges:

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34. Complainant realleges each and every allegation set

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forth in paragraphs 1 through 33 of the original accusation as

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though fully set forth.

1 ADDITIONAL CHARGES AND ALLEGATIONS

2 Bonnie L.

3 35. At all times herein mentioned Bonnie L. was a
4 patient of respondents Elam and Berkowitz.

5 36. On or about December 21, 1984, Bonnie L. consulted
6 with respondents regarding a possible lower face lift (commonly
7 referred to as neck or jowl lift) and an upper and lower
8 blepharoplasty. During this and subsequent office visits
9 respondents continually attempted to convince Bonnie L. that she
10 should allow respondents to perform a septorhinoplasty, brow
11 lift, and place malar implants in her cheeks. Bonnie L.
12 continually refused to agree or consent to said surgical
13 procedures.

14 37. On or about October 14, 1985, Bonnie L. signed
15 consent forms to have respondents perform upper and lower
16 blepharoplasty and a lower face lift. Said surgery was scheduled
17 to be performed on October 29, 1985.

18 38. On or about October 29, 1985, Bonnie L. went to the
19 respondents' medical office to have the upper and lower
20 blepharoplasty and the lower face lift performed. Shortly after
21 her arrival at respondents' office she was sedated with pre-
22 operative medications. As a result of the medications, Bonnie L.
23 became drowsy and confused. It was at this time that respondent
24 Elam told Bonnie L. that he was going to do the kind of surgery
25 that he thought best and that if she disagreed she could leave.
26 In fact, Elam told Bonnie L. that he was going to do her nose
27 (septorhinoplasty), brow lift, and place the malar implants in

1 her cheeks. While in this confused state and without a clear
2 understanding or appreciation of what procedures Elam told her h
3 was going to perform, Bonnie L. signed consent forms to have each
4 of the surgeries aforementioned performed by respondents'.
5 Whereupon, the respondents performed a brow lift,
6 septorhinoplasty, and placed malar implants in the cheeks of
7 Bonnie L.

8 39. After surgery, B██████ L. learned for the first time
9 that respondents' had performed the septorhinoplasty, brow lift,
10 and placed the malar implants in her cheek. B██████ L. also
11 learned that respondents' did not perform the lower face lift
12 (neck or jowl lift) and upper blepharoplasty even though she
13 requested, paid for, consented to and was told by respondents
14 they would perform those surgeries.

15 40. Although respondents on, October 29, 1985, performed
16 four separate surgical procedures on B██████ L., the respondents'
17 failed to prepare operative reports describing the brow lift,
18 lower blepharoplasty, and placement of the malar implants.

19 41. On or about February 5, 1986, respondents' prepared
20 or caused to be prepared on their behalf, an Attending Physician's
21 Statement for Elam in the amount of \$3,189.00 and an Attending
22 Physicians Statement for Berkowitz in the amount of \$600.00.
23 Each statement listed under Service Rendered the following:

24 "Open Septorhinoplasty with major septal repair of nasal
25 airway obstruction."

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27 ///

1 LEGAL CONCLUSIONS AND DETERMINATION OF ISSUES

2 42. Respondents Elam and Berkowitz are guilty of
3 gross negligence in violation of section 2234 subdivision (b) and
4 subject to discipline by reason of, but not limited to the
5 following:

6 (a) Respondents performed three surgical procedures on
7 Bonnie L. on October 29, 1985, as alleged in paragraph 38 above,
8 without obtaining B L's. actual or legal consent to perform
9 said surgeries.

10 (b) Respondents deliberately and intentionally failed to
11 perform the two surgical procedures B L. had paid for and
12 consented to and which respondents had expressly agreed to
13 perform, as alleged in paragraph 39 above.

14 43. Respondents Elam and Berkowitz are guilty of
15 repeated acts of negligence in violation of section 2234
16 subdivision (c) and subject to discipline, in that respondents
17 failed to prepare written detailed operative reports on three
18 surgeries performed on patient B L. as alleged in paragraph
19 40 above and failed prepare a written detailed operative report
20 of the scar revision of the tummy tuck performed on patient
21 L B. as alleged in paragraph 19 (E) above in the original
22 accusation.

23 44. Respondents Elam and Berkowitz are guilty of
24 dishonesty in violation of section 2234 subdivision (e) and
25 subject to discipline, in that respondents prepared or caused to
26 be prepared consents forms indicating they were signed by B
27 L., on 10/14/85, authorizing respondents to perform a brow lift,

1 septorhinoplasty and place malar implants when, in truth and in
2 fact, said consent forms were signed by B██████ L. on 10/29/85, i
3 respondents' office while she was under the influence of
4 preoperative medications and unable to give actual or legal
5 consent.

6 45. Respondents Elam and Berkowitz are guilty of
7 dishonesty in violation of section 2234 subdivision (e) and
8 subject to discipline, in that they received \$4000.00 payment
9 from B██████ L. in consideration for their performing a lower fac
10 lift and upper and lower blepharoplasty on 10/29/85, and
11 thereafter failed and refused to perform said surgeries, except
12 that the lower blepharoplasty was performed on 10/29/85.

13 46. Respondents Elam and Berkowitz are guilty of furthe
14 acts of dishonesty in violation section 2234 subdivision (e) and
15 subject to discipline, in that they filed or caused to be filed
16 on their behalf, with Blue Cross of California, Attending
17 Physicians Statements that falsely alleged B██████ L. suffered
18 from a nasal airway obstruction as set forth with more
19 particularity in paragraph 41 above

20 47. Respondents Elam and Berkowitz are likewise guilty
21 of signing a false document related to the practice of medicine
22 in violation of section 2261, guilty of creating a false medical
23 record with fraudulent intent in violation of section 2262, and
24 guilty of presenting a false claim for insurance in violation of
25 section 810 and, therefore, subject to discipline all by reason
26 of their conduct as set forth in paragraph 46 above.

27 ///

1 WHEREFORE, complainant prays that the Division hold a
2 hearing on the charges and allegations contained in the
3 accusation and supplemental accusation and following said
4 hearing:

- 5 1. Revoke respondents medical licenses, and,
6 2. Take such other and further action as may be
7 necessary to protect the public health, safety and welfare.

DATED: 2/9/90

Kenneth J. Wagstaff by [Signature]
KENNETH J. WAGSTAFF

KENNETH J. WAGSTAFF
Executive Director
Division of Medical Quality
Medical Board of California
State of California

Complainant

BDL:sg